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## Constitutional Reform in Japan

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## CONSTITUTIONAL REFORM IN JAPAN

*Nobuhisa Ishizuka*<sup>1</sup>

## INTRODUCTION

Over seventy years ago it would have seemed inconceivable in the aftermath of a calamitous war that a complete reorientation of Japan into a pacifist society, modeled on Western principles of individual rights and democracy, would succeed in upending a deeply entrenched political order with roots dating back centuries.<sup>2</sup>

The post-war Japanese constitution lies at the heart of this transformation. Drafted, negotiated and promulgated a mere fourteen months after Japan's formal surrender,<sup>3</sup> it has remained a model of stability amidst transformational changes in the domestic and international political landscape.<sup>4</sup> In the seventy-plus years since its adoption, it has not been amended once.<sup>5</sup>

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<sup>2</sup> See Hideo Tanaka, *The Conflict Between Two Legal Traditions in Making the Constitution of Japan* [hereinafter, "Tanaka, *Legal Traditions*"], in *DEMOCRATIZING JAPAN: THE ALLIED OCCUPATION* 107–26 (Robert E. Ward & Yoshikazu Sakamoto eds., 1987) [hereinafter, "DEMOCRATIZING JAPAN"] (describing how the Japanese tradition of constitutional scholarship posed obstacles to the recognition and acceptance of the liberal ideals sought to be imposed upon Japan after the war, and how "ideas that were totally foreign to Japanese tradition [have] taken root and become part of Japan's political culture").

<sup>3</sup> Hideo Tanaka, *A History of the Constitution of Japan of 1946*, in *THE JAPANESE LEGAL SYSTEM* 654–64 (H. Tanaka & M. Smith, eds., 1976) [hereinafter, "Tanaka, *Constitutional History*"].

<sup>4</sup> Kenneth Mori McElwain, *What do Japanese People Want from Their Constitution?* (paper prepared for the Conference on Constitutional Reform in Japan at Columbia Law School (March 13, 2019), copy on file with the author, 1) [hereinafter, "McElwain"] ("[t]he Constitution of Japan is the oldest unamended constitution in the world.").

<sup>5</sup> In contrast, the German Basic Law has been amended 60 times since 1949; the French Constitution has been amended 24 times since 1958; and the U.S. Constitution has been amended 18 times—six times since the end of World War II. Takeshi Inoue, *The Constitution of Japan and Constitutional Reform*, 23 *ASIA-PACIFIC REV.* 7 (2016) [hereinafter, "Inoue, *Japan Constitution*"].

Yet despite its apparent stability, inherent structural tensions surrounded it from the moment of inception. Given the innovations of the document, the unfamiliar nature of many of the principles set forth within it, the manner of its adoption and the controversy over its origins, the real question behind the current constitutional reform debates is not whether it should be amended, but why it has not already been so.<sup>6</sup>

From the Japanese perspective, not only have the Japanese been able to live with and adapt a wholly alien instrument of national governance, “functioning under its terms [they] presided over one of the most amazing political and economic recoveries in modern history.”<sup>7</sup> From the U.S. perspective, the Japanese constitution essentially remodeled an ancient and complex civilization, with a history wholly at odds with that of the U.S., into a society governed by the U.S.’s universalist values.<sup>8</sup> For casual observers on both sides, the Japanese people have every reason to be satisfied with the document.

However, the process of adaptation has prompted debates on fundamental questions of national purpose and identity, and over time its structural gaps and weaknesses have been bridged by a complex mix of legislative action, bureaucratic implementation and judicial interpretation.<sup>9</sup> The current debates around constitutional revision can only be fully understood through a recognition of the document’s competing, sometimes conflicting, legacies.

This article seeks to explain the origins of Japan’s constitutional reform debate, presents a view of what that debate reveals about the social, political and legal tensions that the document has generated, and explores their significance to ongoing attempts to redefine Japan’s role in Asia and beyond.<sup>10</sup> As shown below, strains of early modern social

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<sup>6</sup> Robert E. Ward, *The Commission on the Constitution and Prospects for Constitutional Change in Japan*, 24 J. ASIAN STUD. 402 (1965) [hereinafter, “Ward, *Constitution Commission*”].

<sup>7</sup> *Id.* at 402–03.

<sup>8</sup> KENNETH B. PYLE, JAPAN IN THE AMERICAN CENTURY 110 (Cambridge: Harvard University Press, 2018) [hereinafter, “PYLE, AMERICAN CENTURY”]. General Douglas A. MacArthur, Supreme Commander of the Allied Powers, stated it was “probably the single most important accomplishment of the occupation.” DOUGLAS MACARTHUR, REMINISCENCES 302 (New York: McGraw-Hill Book Company, 1964) [hereinafter, “REMINISCENCES”].

<sup>9</sup> See KYOKO INOUE, MACARTHUR’S JAPANESE CONSTITUTION (Chicago: The University of Chicago Press, 1991) (describing and analyzing the Diet debates of the constitution’s provisions governing religious freedom, the Emperor and individual dignity). See also *infra* text at notes 60–80.

<sup>10</sup> This article is not intended to present a new theory of Japanese constitutionalism, nor does it conduct a deep dive into, nor provide a complete description of the scope

and political conservatism (which in turn have their roots in pre-industrial Japan) have not disappeared as a result of the reforms imposed by the constitution. They have revealed themselves during constitutional reform debates in various forms and at various times during the post-war period. For those seeking to understand Japan's responses to a changing global order, the significance of this is two-fold.

First, significant domestic tensions between opposing social and political groups with fundamentally different views of Japan's role in Asia and the world have underlied the process of adaptation. Notwithstanding that the document's principles are firmly embedded in the public consciousness and are largely functioning effectively, this masks potentially damaging confrontations between opposing camps separated by a wide philosophical gulf.

Second, the constitution's reorientation of Japan along pacifist ideals has intimately aligned the country with the U.S., particularly in security matters, which has constrained Japan's ability to chart an independent path on foreign policy. The current debates around constitutional reform—in an environment vastly different from the one in which the document originated—illustrate the struggle between opposing views of Japan's larger identity and purpose.

#### ORIGINS OF THE DOCUMENT

Technically an amendment to the 1889 Meiji Constitution, the current constitution was never put to a direct popular vote or referendum.<sup>11</sup> The Meiji Constitution itself, promulgated as a gift of the

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of, contemporaneous social, economic and political life in which adaptive responses to the document were undertaken.

<sup>11</sup> Theodore H. McNelly, *Induced Revolution: The Policy and Process of Constitutional Reform in Occupied Japan* [hereinafter, "McNelly, *Constitutional Reform*"], in *DEMOCRATIZING JAPAN*, *supra* note 2, at 27 ("...proposals ... that the proposed constitution be deliberated on by ... a constituent assembly and then be submitted to a popular referendum were successfully resisted ...."); Ward, *Constitution Commission*, *supra* note 6, at 403 ("it is ... difficult to attach much importance to the debates and voting which led to the acceptance of the constitution by the Imperial Diet and Privy Council," noting the difficulty in assessing Japanese public opinion when the new constitution was under consideration amidst the post-war chaos, economic desperation and absolute authority of the Allied Occupation). Under the procedures at the time, promulgation only required the Imperial Order of the Emperor with Imperial Diet approval. DAI NIHON TEIKOKU KENPO [MEIJI KENPO] [MEIJI CONSTITUTION], art. 73 (1889) (the "Meiji Constitution").

Emperor to the people, has also never been put to a popular vote.<sup>12</sup> As a result, to this day, Japan has never had a popularly approved governing document for the nation.

The first draft of the current constitution (eventually adopted substantially as presented to the Japanese government by U.S. authorities) was created by teams of U.S. military and civilian officials in the Government Section of the General Headquarters (“GHQ”) of the Supreme Commander of the Allied Powers (“SCAP”).<sup>13</sup> None of the U.S. individuals involved in drafting it were experts in constitutional law.<sup>14</sup> After rejecting an initial draft presented to it by the Japanese government, SCAP created its own version over eight days.<sup>15</sup> It was accepted in principle by the Japanese government ten days later and was debated by the Imperial Diet and negotiated between the government and GHQ over the ensuing eight months.<sup>16</sup>

A number of issues have been raised about the circumstances surrounding its adoption. Scholars have raised questions about the scope of authority of the occupying forces<sup>17</sup> and the appropriate level of foreign government involvement in the domestic political affairs of occupied territories under international law,<sup>18</sup> citing the self-

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<sup>12</sup> Toshiyoshi Miyasawa, *Kempo [The Constitution]*, in THE JAPANESE LEGAL SYSTEM 683–84 [hereinafter “Miyasawa”].

<sup>13</sup> See *infra* notes 14–16.

<sup>14</sup> See Robert E. Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 980, 994 (1956) [hereinafter, “Ward, *Origins*”] (“none appears to have specialized in constitutional law”); see also OSAMU NISHI, TEN DAYS INSIDE GENERAL HEADQUARTERS 43–45 (Tokyo: Seibundo, 1987) (showing, however, that a number of the drafters had legal or other advanced degrees and one had been a U.S. Member of Congress).

<sup>15</sup> Tanaka, *Constitutional History*, *supra* note 3, at 660.

<sup>16</sup> For a general overview of the creation process, see *id.*, at 653–81; Theodore H. McNelly, *Domestic and International Influences on Constitutional Revision in Japan, 1945–1946* (Columbia University Ph.D. dissertation, 1952); KENZO TAKAYANAGI ET AL. EDS., NIHONKOKU KENPO SEITEI NO KATEI, 2 Vols. (Tokyo: Yuhikaku, 1972) [hereinafter, “TAKAYANAGI ET AL.”]; Ward, *Origins*, *supra* note 14, at 980–1010; JOHN W. DOWER, EMBRACING DEFEAT 346–404 (New York: W.W. Norton & Company, Inc., 1999) [hereinafter, “DOWER, EMBRACING DEFEAT”].

<sup>17</sup> Ward, *Origins*, *supra* note 14, at 981. Japan was under the military occupation of the allied forces, under the executive authority of SCAP, for seven years. Reformation of its political system was a condition of their withdrawal. See *infra* note 22 and text at note 30.

<sup>18</sup> Harold S. Quigley, *Revising the Japanese Constitution*, 38 FOREIGN AFF. 140, 142 (1959) [hereinafter, “Quigley, *Revising the Constitution*”]; MEIRON AND SUSIE HARRIES, SHEATHING THE SWORD 87–88 (New York: Macmillan Publishing Company, 1987).

determination principles of the Atlantic Charter,<sup>19</sup> the UN Charter,<sup>20</sup> the Hague Convention,<sup>21</sup> and the Potsdam Declaration.<sup>22</sup> Questions also have arisen about the speed with which the Japanese government was compelled to accept the U.S. draft,<sup>23</sup> the appropriate scope of the Supreme Commander's authority in dictating its contents<sup>24</sup> and the coercive manner in which it was adopted.<sup>25</sup>

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<sup>19</sup> Atlantic Charter, U.K.-U.S., Aug. 14, 1941 ("Third, [the U.S. and the United Kingdom] respect the right of all peoples to choose the form of government under which they will live...").

<sup>20</sup> U.N. Charter, ch. XI, art. 73, Oct. 24, 1945 ("Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount...and, to this end: ... to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples....").

<sup>21</sup> 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Annex to the Convention art. 43, Oct. 18, 1907, 36 Stat. 2277 ("The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.")

<sup>22</sup> "Proclamation Calling for the Surrender of Japan, approved by the Heads of Governments of the United States, China, and the United Kingdom," July 26, 1945 (the "Potsdam Declaration"). Paragraph 12 states: "The occupying forces of the Allies shall be withdrawn from Japan as soon as ... there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government." *Id.* at para. 12.

<sup>23</sup> Ward, *Origins*, *supra* note 14, at 986 ("one is constantly troubled by the question of pace and timing [in the series of steps leading to the adoption of the constitution]").

<sup>24</sup> See Courtney Whitney, *Memorandum for the Supreme Commander: Subject: Constitutional Reform, February 1, 1946*, (reproduced in 1 TAKAYANAGI ET AL., *supra* note 16, at 90–98) (addressing the power of the Supreme Commander to approve or disapprove Japanese government proposals or issue orders or directives to the government in connection with fundamental changes to the constitution, "in the absence of any policy decision by the Far Eastern Commission on the subject (which would, of course, be controlling), you have the same authority with reference to constitutional reform as you have with reference to any other matter of substance in the occupation and control of Japan").

<sup>25</sup> For a critical view of these matters, see Ward, *Origins*, *supra* note 14, at 980–1010. The rush to create and have Japan adopt the new constitution has been attributed to SCAP's concerns about the impending operational start of the Far Eastern Commission (FEC) at the end of February 1946, after which it would lose exclusive jurisdiction over the issue. Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the 'Reinterpretation' of Japan's War Powers*, 40 FORDHAM INT'L L.J. 427, 463 (2017) [hereinafter, "Martin, *Informal Amendment*"]; Tanaka, *Constitutional History*, *supra* note 3, at 657–58; TAKAYANAGI ET AL., *supra* note 16,

Japanese political leaders were concerned about preserving the institution of the Emperor and as much of the pre-war social and political order as possible.<sup>26</sup> At the same time, Japan was entirely reliant on the U.S. and its allies for economic assistance, security and the goodwill necessary to rebuild its standing in the world community.<sup>27</sup> This gave SCAP significant leverage to implement its vision of a new democratic order for the country while it had a free hand—before the Far Eastern Commission (the “FEC”),<sup>28</sup> which counted among its members China and the Soviet Union, could be in position to impose a far different, more punitive, agenda.<sup>29</sup>

Personalities undoubtedly played a role in the adoption process, which has contributed to the controversy over the document’s origins. General Douglas A. MacArthur, the Supreme Commander of the Allied Powers, was a strong proponent of constitutional reform as a necessary condition for Japan to not only satisfy the conditions of the Potsdam Declaration (which in turn was a precondition to the end of the Allied Occupation), but also to completely pacify and transform the political

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at xxiv–xxv. MacArthur attributed the timing to a desire for the voting in elections scheduled to be held on April 10, 1946 to be a plebiscite on the new constitution. REMINISCENCES, *supra* note 8, at 300.

<sup>26</sup> Tanaka, *Constitutional History*, *supra* note 3, at 656; *Offer of Surrender from Japanese Government*, August 10, 1945 (Department of State Bulletin, Vol. XIII, No. 320, Aug. 12, 1945) (accepting the terms of the Potsdam Declaration “with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler”); 1 THE POLITICAL REORIENTATION OF JAPAN, REPORT OF GOVERNMENT SECTION, SUPREME COMMANDER FOR THE ALLIED POWERS 98–101 (Government Printing Office, 1951) [hereinafter, “POLITICAL REORIENTATION”] (stating that the initial Japanese government draft of the revised constitution “do[es] not go beyond the most modest of modifications in the language of the Meiji constitution. The basic nature of the Japanese state is left unchanged ... the authority and powers of the Emperor are not altered or weakened in any real way”).

<sup>27</sup> See Ward, *Constitution Commission*, *supra* note 6, at 403 (discussing how these factors constrained post-war political leaders from advocating openly for constitutional change during the Allied Occupation).

<sup>28</sup> The body formed to provide an allied role in policy making for Japan, it was to fall into ineffectiveness in the face of the policy-making power of the U.S. and the executive power granted to the Supreme Commander. DEAN ACHESON, PRESENT AT THE CREATION 427–28 (New York: W.W. Norton & Company, 1969).

<sup>29</sup> Letter to Jiro Shirasu, Assistant to Foreign Minister, from Brig. Gen. Courtney Whitney (February 16, 1946) (reproduced in 1 TAKAYANAGI ET AL., *supra* note 16, at 346) (“... the matter of constitutional reform in Japan is not confined to the exclusive interest of the Japanese people or even ... the Supreme Commander ... it is quite possible that a constitution might be forced upon Japan from the outside which would render the term ‘drastic’ as used by you ... far too moderate a term....”).

and social structure of the country.<sup>30</sup> And, he was determined to do so without interference from either the bureaucracy in Washington or its allies.<sup>31</sup>

General MacArthur's Japanese counterparts in the negotiations were pre-war political liberals, socially conservative in disposition and outlook, seeking to preserve values and practices that could be portrayed (and were viewed by many) as reversions to a discredited, conservative pre-war Meiji political system.<sup>32</sup> Yet, they had virtually no means to reject the reforms imposed on Japan by the U.S. authorities.<sup>33</sup> They were instead compelled to present the document to the public as a Japanese-originated and -endorsed instrument of political and social transformation.<sup>34</sup> During the eight-month negotiation process there were opportunities to add language and to clarify, adapt and conform certain provisions to Japanese linguistic, social and political norms.<sup>35</sup> But they had no ability to alter the fundamental foundations of the new political and social order it established.<sup>36</sup>

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<sup>30</sup> POLITICAL REORIENTATION, *supra* note 26, at 90–91 (“[MacArthur] clearly recognized at the outset that no political reform that did not encompass revision of the constitution would be worth serious consideration.”; “MacArthur pointedly advised the new Prime Minister that the reforms which Japan must undertake ‘will unquestionably involve a revision of the Constitution.’”); REMINISCENCES, *supra* note 8, at 299 (“a new charter was immediately imperative if the structure of Japanese self-government was to be sustained”).

<sup>31</sup> See 2 DALE M. HELLEGERS, *WE, THE JAPANESE PEOPLE* 436–37 (Stanford: Stanford University Press, 2001) (“MacArthur learned not to trust Washington or let it in on its plans but to present a string of *faits accomplis* that could not easily be undone without undoing the Occupation”); see also Robert E. Ward, *Presurrender Planning: Treatment of the Emperor and Constitutional Changes*, in *DEMOCRATIZING JAPAN*, *supra* note 2, at 27–28 (suggesting that MacArthur’s deliberate failure to convey Washington D.C.’s guidelines for constitutional revision to Japanese drafters invited a Japanese draft that would prove to be unacceptable to the U.S., providing the pretext for occupation officials to intervene with its own draft).

<sup>32</sup> Ward, *Constitution Commission*, *supra* note 6, at 417.

<sup>33</sup> Inoue, *Japan Constitution*, *supra* note 5, at 5–6 (“[t]he end product may have included independent contributions by members of the Imperial Diet ... but GHQ had to sign off on every proposed modification and never allowed Japanese law makers to deviate from the basic principles it had originally set forth.”).

<sup>34</sup> *Id.* at 28–29; DOWER, *EMBRACING DEFEAT*, *supra* note 16, at 383–87.

<sup>35</sup> See *infra* text at note 63; see also COLIN P.A. JONES & FRANK S. RAVITCH, *THE JAPANESE LEGAL SYSTEM* 162 (West Academic Publishing 2018) [hereinafter, “JONES & RAVITCH”] (citing examples of provisions that were included during the deliberative process).

<sup>36</sup> Ward, *Constitution Commission*, *supra* note 6, at 409.



## CONSEQUENCES OF THE DOCUMENT

The post-war constitution completely inverted the political structure that had existed during the pre-war Meiji era.<sup>37</sup> Under the Meiji Constitution, political power was exercised by oligarchs who emerged from the lower strata of the ruling class that had existed in Japan from the early 17<sup>th</sup> century.<sup>38</sup> While making some concessions to strong democratic impulses that arose among the population during the initial period of the Meiji Restoration,<sup>39</sup> the oligarchs retained almost complete political and social control through the legislative and judicial structures they created.<sup>40</sup>

The post-war constitution upended this structure by establishing democracy, individual rights and pacifism as core governing principles for the country.<sup>41</sup> In addition to establishing the popularly elected Diet as the supreme law-making organ of state,<sup>42</sup> the document stripped the former ruling class of their status and powers.<sup>43</sup> It also expressly elevated universal human rights to a constitutionally protected status,<sup>44</sup> established co-equal legislative, executive and judicial branches of government,<sup>45</sup> and mandated the permanent disarmament of the country.<sup>46</sup>

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<sup>37</sup> Miyasawa, *supra* note 12, at 683 (“the legal nature of [the] change [which established the principle of popular sovereignty “in spite of, or in violation of, the Meiji Constitution”] was revolutionary”); Ward, *Constitution Commission*, *supra* note 6, at 401.

<sup>38</sup> Hugh Borton, *Past Limitations and the Future of Democracy in Japan*, 70 POL. SCI. Q. 410–11 (Sep. 1955) [hereinafter, “Borton, *Democracy in Japan*”]; Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 421–26 (1999) [hereinafter, “Hamano, *Constitution and Human Rights*”].

<sup>39</sup> Hamano, *Constitution and Human Rights*, *supra* note 38, at 423 (“[t]he Meiji oligarchs ... understood that the powerful forces pressing from below for social and political revolution could not be ignored”).

<sup>40</sup> See Borton, *Democracy in Japan*, *supra* note 38, at 410–11. At the center of the governmental structure they created was the Emperor, under whose broad policies they operated and under whose legal sanction they exercised wide powers. *Id.* at 410.

<sup>41</sup> See HIROSHI ODA, JAPANESE LAW 29–30 (noting these as “fundamental principles underlying the constitution”) (Oxford: Oxford University Press, 3rd ed. 2009); McNelly, *Constitutional Reform*, *supra* note 11, at 98.

<sup>42</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. IV, art. 41 (Japan).

<sup>43</sup> *Id.* ch. III, art. 14.

<sup>44</sup> *Id.* ch. III (Rights and Duties of the People).

<sup>45</sup> *Id.* ch. IV (The Diet), ch. V (The Cabinet) and ch. VI (Judiciary).

<sup>46</sup> *Id.* ch. II, art. 9 (Renunciation of War).

The new constitution represented a radical departure from the political and social conventions that had existed in the country for centuries. Significant attention has been focused on the reduction of the role of the Emperor from “sacred and inviolable” to “symbol of the State” in Article 1, and the renunciation of war and permanent disarmament clauses of Article 9.<sup>47</sup> Often overlooked is how completely the document uprooted such foundational elements of Japanese society as centralized control over local government, restrictions on labor rights, constraints on gender equality, control over education and perpetuation of the family structure.<sup>48</sup> Filial piety and the family unit, together with the imperial line embodied by the Emperor, has long constituted the heart of the national identity of the people.<sup>49</sup>

The haste of adoption and the ad-hoc nature of the drafting process created additional issues. On a practical level, critics cite flaws such as inconsistencies between, and poor drafting of, the English and Japanese versions, and conflicting, duplicative and inconsistent terms within the English version.<sup>50</sup>

It did not take long for political lines to be drawn in the debates around the document. For the conservative political elite, it was an alien-authored imposition of universalist principles incompatible with Japanese social customs and values.<sup>51</sup> There is reasonable basis to conclude they only acquiesced to its adoption because it was the least

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<sup>47</sup> HERBERT BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* 575–78, 569, 571 (2001).

<sup>48</sup> Borton, *Democracy in Japan*, *supra* note 38, at 412–15.

<sup>49</sup> CAROL GLUCK, *JAPAN’S MODERN MYTHS* 133 (Princeton: Princeton University Press, 1985) (in describing the role of the Imperial Rescript on Education of 1890 in forging national unity through the establishment of a new “civil morality”: “‘Japan’s indigenous morality’ began with filiality and the family and then extended to the nation in the form of loyalty and patriotism”); KENNETH J. RUOFF, *THE PEOPLE’S EMPEROR* 18 (Cambridge: Harvard University Asia Center, 2001) (“the intellectual foundations of modern nationalism centering on the throne can be traced to the seventeenth century ... during the three centuries of Tokugawa rule ... nativist ... scholars defined the throne as the distinctive feature of Japanese identity”).

<sup>50</sup> DOWER, *EMBRACING DEFEAT*, *supra* note 16, at 386; Ward, *Origins*, *supra* note 14, at 1006–07 (noting the “unmistakable alien and American quality of the language in both” and that “the style is simply not good Japanese”).

<sup>51</sup> Ward, *Origins*, *supra* note 14, at 1001 (“an almost ideally democratic constitution, ... [i]t had even less relevance to the traditional and dominant political aspirations and practices of Japan”); Ward, *Constitution Commission*, *supra* note 6, at 403 (“[t]here is small doubt ... that the document as a whole was distinctly unpalatable to a large number of the members (including both prime ministers) of the Shidehara and Yoshida cabinets, the two governments that presided over and were ostensibly responsible for its drafting and enactment”).

objectionable alternative open to Japan at the time.<sup>52</sup> Many observers assumed it was only a matter of time before it would be amended.<sup>53</sup>

For the liberals and intellectuals who had been persecuted and sidelined during the pre-war years, the constitution enshrined the democratic values they aspired for the country to adopt.<sup>54</sup> Reflecting strong leftist sentiments that had been unleashed in Japan—mirroring similar movements across Asia—they had no interest in seeing the governance of the country revert to unchecked right-wing control.<sup>55</sup> As later years show, they were determined to ensure its principles remained intact and untouched.<sup>56</sup>

A number of the document's provisions soon raised uncomfortable issues for the U.S. The outbreak of the Korean War in 1950—scarcely three years after its enactment—highlighted the negative consequences of imposing permanent disarmament on Japan in light of its strategic importance.<sup>57</sup> Even in the lead-up to the conflict, the U.S. had already started to retreat from the liberal democratic principles it had insisted upon through strict controls over free labor movements and censorship of leftist and anti-Occupation media, all in

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<sup>52</sup> Ward, *Constitution Commission*, *supra* note 6, at 403.

<sup>53</sup> DOWER, *EMBRACING DEFEAT*, *supra* note 16, at 400; Ward, *Constitution Commission*, *supra* note 6, at 402.

<sup>54</sup> DOWER, *EMBRACING DEFEAT*, *supra* note 16, at 387. *See also, id.* at 356–58 (describing an early private draft produced by *Kempo Kenkyukai* (Constitutional Research Association), composed of liberal and left-wing intellectuals, which was deemed by GHQ as “democratic and acceptable” and praised for its “outstanding liberal provisions”, making it influential in GHQ’s own draft). Hajime Yamamoto, *Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law?*, 26 PAC. RIM L. & POL’Y 99, 102 (2017) [hereinafter, “Yamamoto, *Constitutional Interpretation*”].

<sup>55</sup> *See* DOWER, *EMBRACING DEFEAT*, *supra* note 16, at 233–39, 249–50 (noting the role of atonement and repentance on the part of intellectuals and academics, who had largely acquiesced to the state during the war, as powerful motivating forces for their embrace of leftist idealism after defeat).

<sup>56</sup> *See* PYLE, *AMERICAN CENTURY*, *supra* note 8, at 182–87 (on the roots of Japan’s postwar progressive politics).

<sup>57</sup> PYLE, *AMERICAN CENTURY*, *supra* note 8, at 161–62 (describing how American-imposed mandates of renunciation of war, peace education and the enfranchisement of women (who were overwhelmingly against re-armament), together with the rise of left-wing sentiment and fears of reawakening militarism, all constrained Japan’s ability to acquiesce to U.S. demands for Japan to re-militarize). The communist victory in China in 1949, the outbreak of the Korean War and the emergence of the Cold War forced U.S. policymakers to ensure Japan played a central role in the regional balance of power. The ability of Japan to defend itself was deemed necessary to ensure its ability to remain independent and prevent its gravitation into the Soviet orbit. *Id.* at 150–53.

reaction to the rising communist threat in the region and significant domestic unrest.<sup>58</sup> These changing circumstances highlighted some of the many contradictions and tensions created by the document that required some form of adaptive response.

#### THE PROCESS OF ADAPTATION

On the domestic front, the process of adapting the democratic principles of the constitution to the conservative social and political conventions of the country was a laborious and complex undertaking that started almost immediately after promulgation. No fewer than forty-five laws were passed to enact its provisions and replace or overhaul existing laws that had become invalid.<sup>59</sup>

The views of opposing political parties, including conservatives, socialists, and communists, had to be negotiated and reconciled.<sup>60</sup> The FEC, having been excluded from the initial drafting process,<sup>61</sup> pressed SCAP for its views to be incorporated.<sup>62</sup> Negotiations between GHQ and the Japanese government worked to resolve these as well as other comments and requests for changes from the Japanese side. Differences

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<sup>58</sup> DOWER, *EMBRACING DEFEAT*, *supra* note 16, at 405–40. Initially intent on the complete political and social liberalization of the country, the U.S. was forced to reverse course on a number of reform initiatives. The Japanese left, originally supporters of the U.S. agenda, grew increasingly disenchanted with U.S. policy. In matters of security the U.S., initially having supported the complete disarmament of the country, was actively urging rearmament and increased burden-sharing for its defense. The Japanese right, which should have welcomed the change, was now caught in the middle of new U.S. demands, its own desire to place higher priority on urgent economic stability and recovery, and continuing disarmament pressure from the non-U.S. Allied Powers. Akira Iriye, *Japan Returns to the World*, in GORDON A. CRAIG & FRANCIS L. LOEWENHEIM EDS., *THE DIPLOMATS 1939–1979*, 328 (Princeton: Princeton University Press, 1994).

<sup>59</sup> McNelly, *Constitutional Reform*, *supra* note 11, at 98 (citing *POLITICAL REORIENTATION*, *supra* note 26). Other accounts place the number at eighty new laws. D. CLAYTON JAMES, *THE YEARS OF MACARTHUR: TRIUMPH AND DISASTER 1945–1964*, 140 (Boston: Houghton Mifflin Company, 1985).

<sup>60</sup> Inoue, *Japan Constitution*, *supra* note 5, at 31–36 (noting the debates in the Imperial Diet lasted for 114 days, with the government responding “well over” one thousand times to questions from more than 104 interpellators, generating more than thirty-five hundred pages of transcripts).

<sup>61</sup> See *supra* text at notes 28–29.

<sup>62</sup> Ward, *Origins*, *supra* note 14, at 1006; McNelly, *Constitutional Reform*, *supra* note 11, at 96–98.

of nuance, meaning, and interpretation had to be reconciled between the English and Japanese drafts.<sup>63</sup>

During the entire process, the U.S. views being imposed had to be balanced with ensuring the document reflected the “freely expressed will of the Japanese people,”<sup>64</sup> an express condition of the Potsdam Declaration.<sup>65</sup> The process of negotiating the constitutional text and the concurrent implementing legislation involved an active ongoing debate among all the political parties represented in the Imperial Diet.<sup>66</sup> This supported GHQ’s interest in ensuring its reforms were adopted in a manner that would promote their longevity after the Allied Occupation ended.<sup>67</sup>

The constitutional debate in the Imperial Diet was also consistent with the willingness of at least some at GHQ to accommodate conservative desires to retain vestiges of the old pre-war system, provided basic principles were not threatened.<sup>68</sup> Thus, while the constitutional text generally retained its original wording,<sup>69</sup> the implementing legislation was passed (where acceptable) in conformity with more familiar Japanese customs and practices.<sup>70</sup>

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<sup>63</sup> Ward, *Origins*, *supra* note 14, at 1001–06; Inoue, *Japan Constitution*, *supra* note 5, at 33.

<sup>64</sup> Basic Initial Post-Surrender Directive to Supreme Commander for the Allied Powers for the Occupation and Control of Japan, Nov. 3, 1945, para. 3.a (*in* 2 POLITICAL REORIENTATION, *supra* note 26, at 429) (“it is not the responsibility of the occupation forces to impose on Japan any form of government not supported by the freely expressed will of the people”). *See also* Tanaka, *Legal Traditions*, *supra* note 2, at 113 (“knowledge that [the reforms] had been imposed by the Allies would materially reduce the possibility of their acceptance and support by the Japanese people for the future.”) (quoting State-War-Navy Coordinating Committee policy directive SWNCC-228).

<sup>65</sup> Potsdam Declaration, *supra* note 22, para. 12.

<sup>66</sup> *See supra* text at note 60.

<sup>67</sup> Kurt Steiner, *The Occupation and the Reform of the Japanese Civil Code*, [hereinafter, “Steiner, *Civil Code Reform*”] *in* DEMOCRATIZING JAPAN, *supra* note 2, at 211. Ironically, SCAP itself was compelled to bow to political exigencies by rolling back reform through its “reverse course” in 1946. *See supra* note 58 and accompanying text.

<sup>68</sup> *See, e.g.*, Steiner, *Civil Code Reform*, *supra* note 67, at 203–05 (describing the debates between conservatives, progressives and communists about the degree to which the pre-war family system should be reformed or retained).

<sup>69</sup> Inoue, *Japan Constitution*, *supra* note 5, at 33 (“the Americans insist[ed] that the respective meanings of the English and Japanese expressions had to be very close, if not the same”).

<sup>70</sup> *Id.*

<sup>71</sup> *See, e.g.*, Hideki Mori, *Workers’ Rights in Japanese Labor Praxis*, *in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 171–293 (Yoichi Higuchi ed., 2001)

In certain areas where legislative acts implemented SCAP reforms in a manner consistent with the constitutional text, the process of adaptation took the form of post-Occupation legislation which revised or superseded Occupation-era laws.<sup>71</sup> Such actions were taken with respect to various laws, including those regulating public education<sup>72</sup> and local governmental autonomy.<sup>73</sup>

In areas where reforms embodied in the constitutional text were not implemented through legislation, such provisions were left open to administrative interpretation. In certain cases, bureaucratic implementation altered the original intent of a number of important provisions. These include the rights of academic freedom under Article 23<sup>74</sup> and most notably, the disarmament clause of Article 9.<sup>75</sup> Thus, while continuing to preserve the original wording, the substantive meaning of certain provisions were reinterpreted to conform to more desirable Japanese customs and practices or to respond to changing international circumstances.

These adaptive processes have been granted relative freedom to operate as a result of judicial deference to bureaucratic actions and the

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(setting forth an overview of the relatively restrictive body of law that co-exists with constitutional provisions unconditionally guaranteeing fundamental labor rights including the right to strike).

<sup>71</sup> See *infra* notes 72–73.

<sup>72</sup> See, e.g., Law on the Organization and Management of Local Education Administration (1956) (which replaced the School Board Law (1948)) (replacing popular election of members of the boards of education with an appointment system, and placing them under the control of prefectural boards which need approval of the Ministry of Education on important policy matters); see also Masayuki Uchino, *The Struggle for Educational Freedom*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 118 (Yoichi Higuchi ed., 2001).

<sup>73</sup> See Yoshiaki Yoshida, *Authority of the National and Local Governments Under the Constitution*, in JAPANESE CONSTITUTIONAL LAW 111 (Percy R. Luney Jr. & Kazuyoshi Takahashi eds., 1993) (citing revisions to the Police Law in 1954 and the enactment of the Organization and Management of Local Education Administration in 1956 as examples of national government increases of power over local government, and citing local finance and employment as other areas of central control, attributing the increase in this tendency to the rapid economic growth of the 1960s and subsequent expansion of executive powers in Tokyo).

<sup>74</sup> See Don Adams & Mamoru Oshiba, *Japanese Education: After the Americans Left*, 39 PEABODY J. OF EDUC. 9, 111 (1961) (during the Occupation, “[a]lthough the Ministry of Education continued to set certain minimum standards, textbooks were permitted to be published by private publishers and selected for use by local school boards”, after the Occupation the Ministry of Education “more closely supervise[s] the content of textbooks . . . and make[s] alterations consistent with the policies of the Ministry.”).

<sup>75</sup> See *infra* text at notes 156–92.

reluctance of the Supreme Court to exercise its power of judicial review over the constitutionality of administrative action or Diet legislation.<sup>76</sup> Accordingly, the current constitution functions somewhat as a “hybrid” instrument<sup>77</sup> which has come to be implemented and interpreted—and to function—quite differently from its plain meaning in a number of areas.<sup>78</sup> This has led to substantial and spirited debate about whether the process of legislative action and bureaucratic interpretation has crossed the line of amending the constitution, in violation of the formal amendment process mandated by Article 96.<sup>79</sup> It also has given weight to arguments for the need for formal amendments.<sup>80</sup>

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<sup>76</sup> See *infra* text at notes 132–39; see also David S. Law, *Why Has Judicial Review Failed in Japan?*, 68 WASH. U. L. REV. 1425, 1447 (2011) [hereinafter, “Law, *Judicial Review*”] (“... it is clear that the [Supreme Court] exercises a large measure of self-restraint in the area of judicial review, and especially so where politically sensitive issues are involved.”). In areas where the Supreme Court has been willing to exercise such review and has found constitutional violations, it has been hampered by its lack of contempt powers and its circumspection about exercising continuing jurisdiction over parties that would ensure compliance with its rulings. *Id.* at 1452; see also John O. Haley, *Constitutional Adjudication in Japan: Context, Structures and Values*, 88 WASH. U. L. REV. 1467, 1484–85 (2011).

<sup>77</sup> Yamamoto, *Constitutional Interpretation*, *supra* note 54, at 119 (with respect to interpretative adaptation: “because interpretation has an effect similar to that of constitutional amendment, but is not constitutional without an amendment, it is a ‘semi-constitutional’ norm or ‘quasi-constitutional’ norm *contra legem* . . . such a way of thinking on the ‘semi-constitutional’ norm is particular to Japanese constitutionalism”).

<sup>78</sup> See Ward, *Constitution Commission*, *supra* note 6, at 402 (“[t]he Japanese Government has by administrative means and by legal and judicial interpretations subverted or substantially altered the original intent of several important provisions of the . . . constitution and the prime laws associated with it . . .”); see also Law, *Judicial Review*, *supra* note 76, at 1431 (quoting a “Current or Former Member of the Supreme Court of Japan”: “the Japanese ‘do believe in the power of words, but not in the literal meaning of words expressed’”).

<sup>79</sup> See, e.g., Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 67 AM. J. COMP. L. 145, 176 (2019); Martin, *Informal Amendment*, *supra* note 25, at 467–68 (arguing that a 2013 reinterpretation of Article 9 amounted to a *de facto* amendment inconsistent with past interpretations); Hamano, *Constitution and Human Rights*, *supra* note 38, at 417 (“the Constitution often may have been radically and undemocratically amended despite its apparently pristine text”); Yamamoto, *Constitutional Interpretation*, *supra* note 54, at 114–15. But see McElwain, *supra* note 4, at 2–4 (arguing that the brevity of Japan’s constitution reduces the necessity for amendments, noting for example that constitutional vagueness on the architecture of government has permitted electoral laws to determine matters normally requiring constitutional amendment in other countries to be determined by simple legislative majority). See also *infra* note 102.

<sup>80</sup> Yamamoto, *Constitutional Interpretation*, *supra* note 54, at 118 (“the current majority of Japanese constitutional scholars now affirm emphatically that [changes

## ROOTS OF THE AMENDMENT DEBATE

As the conservative party in power during the entire post-war era, except for two brief periods, the Liberal Democratic Party (LDP) has been able to implement the foregoing changes in interpretation of the constitution largely, although not completely, in conformity with its policy views.<sup>81</sup> It is perhaps not surprising that a number of deviations echo the early attempts during the original negotiations with SCAP's Government Section to preserve certain aspects of pre-war political and social institutions and practices, to the concern of opposition parties and other anti-revisionists.<sup>82</sup> Having lost many of their arguments with SCAP during the negotiation process, conservative politicians began openly advocating for constitutional change in the early years after adoption and as the end of the Allied Occupation approached.<sup>83</sup>

Against this backdrop a number of arguments have been advanced for and against formal amendments. Conservative proponents argue they would simply make the constitution consistent with the way it is already interpreted and implemented.<sup>84</sup> They view reform as an opportunity to finally settle “theological” debates<sup>85</sup> that have existed since inception—particularly those surrounding the constitutionality of the Self Defense Forces (the “SDF”).<sup>86</sup> Proposed amendments to Article

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such as the 2014 reinterpretation of Article 9 (*see infra* text at notes 184–92)] cannot be implemented without recourse to the procedures for constitutional amendment stipulated by Article 96”).

<sup>81</sup> *See, e.g., infra* text at notes 131, 155. *But see infra* text at notes 123–24.

<sup>82</sup> Yamamoto, *Constitutional Interpretation*, *supra* note 54, at 102

<sup>83</sup> Ward, *Constitution Commission*, *supra* note 6, at 403–04.

<sup>84</sup> Motoko Rich, *Shinzo Abe Announces Plan to Revise Japan's Pacifist Constitution*, N.Y. TIMES, May 3, 2017, at A7. There also are elements of the revisionist camp that believe the origins of the document, having been imposed on the country after defeat, taint its legitimacy and do not reflect the true aspirations of the Japanese people. Sheila A. Smith, *Abe's Win and Japan's Constitutional Debate*, COUNCIL ON FOREIGN RELATIONS, (Oct. 27, 2017), <https://www.cfr.org/expert-brief/abes-win-and-japans-constitutional-debate> [hereinafter, “Smith, *Constitutional Debate*”].

<sup>85</sup> *Library of Congress Report*, *infra* note 127, at 20. *See also* Hideshi Tokuchi, Former Vice-Minister of Defense for International Affairs, Japan Ministry of Defense, Implications of Revision of Article 9 of the Constitution of Japan on the Defense Policy of Japan, Address at the Columbia Law School Conference on Constitutional Reform (Mar. 13, 2019) [hereinafter, “Tokuchi”] (arguing that legal and “theological” arguments impede the development of a common policy community necessary to establish a consensus on national defense; without a “common language and logic on defense matters . . . the focus of the policy discussion will continue to be on the tactical question of how to slip past the constitutional restrictions”).

<sup>86</sup> The main arguments of the revisionists are to make explicit the status of the SDF by formalizing its legality, while leaving the substance of its self-defense focus



9 would finally clarify the textual contradiction of its disarmament provision with the existence of one of the largest and most technologically advanced military forces in the world.<sup>87</sup>

Observers not necessarily driven by political motives cite obvious gaps in the document that need to be addressed. One example is the absence of express authority of the Prime Minister to dissolve the Diet (although exercised by the Prime Minister in practice, such power is expressly reserved to the Emperor).<sup>88</sup> Other issues such as the emergency powers of the Cabinet during national crises (the absence of which was first felt during the 1995 Kobe earthquake and again during the 2011 Fukushima earthquake, tsunami, and nuclear crisis), and abdication of the Emperor (an issue that arose in 2018), are not expressly addressed.<sup>89</sup> There clearly is room to address electoral reform—an area in which the Japanese Supreme Court has found constitutional violations, yet has not prescribed remedies.<sup>90</sup> As for practical considerations in the military realm, there is no system of military justice or courts martial,<sup>91</sup> the status of SDF personnel is equivalent to that of civil servants (subjecting them to the full range of domestic laws, including criminal laws, during deployment),<sup>92</sup> and there is no

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unchanged. Tomohiro Osaki, *Campaign Kicks Off for Japan Upper House Poll, a Litmus Test for Constitutional Reform and Tax Hike*, JAPAN TIMES (July 4, 2019), <https://www.japantimes.co.jp/news/2019/07/04/national/politics-diplomacy/campaign-kicks-off-japans-july-21-upper-house-election>.

<sup>87</sup> According to Global Firepower's 2019 Military Strength Ranking, Japan ranks sixth among nations according to a power index that takes into account a number of factors including weapons and naval asset diversity, nuclear capability, and financial stability. 2019 Military Strength Ranking, GLOBALFIREPOWER.COM, <https://www.globalfirepower.com> (last visited Nov. 19, 2019).

<sup>88</sup> McNelly, *Constitutional Reform*, *supra* note 11, at 98–99; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 7, item 3 (Japan); *see also* Inoue, *Japan Constitution*, *supra* note 5, at 10 (“the government has effectively rationalized dissolving the Lower House in [cases other than no-confidence resolutions] by stretching the interpretation of Article 7, Item 3 . . .”).

<sup>89</sup> Carl F. Goodman, *Contemplated Amendments to Japan's 1947 Constitution: A Return to Iye, Kokutai and the Meiji State*, 26 WASH. INT'L L.J. 17, 26 n.43 [hereinafter, “Goodman, *Contemplated Amendments*”].

<sup>90</sup> Kurokawa v. Chiba Prefecture Election Commission, 30 *Minshu* 3, 223 (Sup. Ct. Grand Bench Judgment of Apr. 14, 1976); Kanao v. Hiroshima Prefecture Election Commission, 39 *Minshu* 5, 1100 (Grand Bench Judgment of July 17, 1985). *See also* Law, *Judicial Review*, *supra* note 76, at 1427 n.8 (noting that in response to the failure of the Diet for decades to comply with the Supreme Court's rulings, “the Court has reiterated in a string of cases that the apportionment scheme remains unconstitutional, but it has consistently declined to order a remedy.”). *See infra* note 131.

<sup>91</sup> JONES & RAVITCH, *supra* note 35, at 99.

<sup>92</sup> *Id.* at 191–92.

constitutional provision mandating subordination of the military to civilian control.<sup>93</sup>

But perhaps the most basic and strongly held argument of the revisionists is based on concepts of legitimacy, sovereignty, and national self-determination.<sup>94</sup> As a prominent scholar noted, this faction believes Japan has successfully cast off its historical impediments to democracy and has “a right and duty to decide for [itself] what form of basic political rights and institutions [it] desire[s], and to embody these decisions in a constitution and language of [its] own choosing . . . based upon [its] history, traditions, and national sentiments.”<sup>95</sup>

In contrast, anti-revisionists have a deep distrust of conservative intentions, rooted in historical memory. For them, the constitution embodies principles that have been core to the post-war identity of the nation, and expresses the lessons of a disastrous, misdirected pre-war political system, serving as a formal check on future abuses.<sup>96</sup> To the extent the conservative majority has been able to control the political responses to the document’s perceived shortcomings through executive and legislative action, the anti-revisionists would prefer to continue to engage in reform through such political processes rather than through formal constitutional change.<sup>97</sup>

In the background, Japan’s Asian neighbors express concern about Japanese intentions and harbor simmering resentments over Japan’s “lack of atonement” for the war.<sup>98</sup> Concurrently, the evolving

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<sup>93</sup> Tokuchi, *supra* note 85, at 5–6. *See also* Richard J. Samuels, *Politics, Security Policy, and Japan’s Cabinet Legislation Bureau* 27–28 (JPRI, Working Paper No. 99, 2004) [hereinafter, “Samuels, *Legislation Bureau*”] (noting arguments that Japan has had “bureaucratic control” over the military in contrast to “civilian control”, further noting that a full understanding of civil-military relations is difficult due to lack of information about the balance of power between bureaucrats and politicians).

<sup>94</sup> *See* McElwain, *supra* note 4, at 1 (noting conservative criticism that the document “unnecessarily constrain[s] the “normal” foreign and security policy autonomy of the nation, . . . elevat[es] individual rights above civic duties, and more generally . . . [is] too antiquated to deal with emerging domestic and international problems”). *See also* Ward, *Constitution Commission*, *supra* note 6, at 409 (citing a March 1964 memorandum signed by 29 members of the Constitution Commission stating that “we cannot recognize that the present constitution of Japan was established by the free will of the people of Japan . . .”).

<sup>95</sup> Ward, *Constitution Commission*, *supra* note 6, at 409.

<sup>96</sup> A principal focus of the anti-revision camp is fully preserving the explicit commitment to peace and the foundations of Japan’s postwar democracy as represented by restructured political power and subordination of the military set forth in the constitution. Smith, *Constitutional Debate*, *supra* note 84.

<sup>97</sup> Ward, *Constitution Commission*, *supra* note 6, at 408. *See infra* text at note 111.

<sup>98</sup> RICHARD MCGREGOR, *ASIA’S RECKONING* 144–211 (2017).

global security landscape since the early 1990s has forced Japan to begin the process of adapting its defense policies to changing international circumstances.<sup>99</sup> These competing interests have potential regional and global implications for Japan's decisions regarding constitutional change, particularly with respect to the disarmament clause of Article 9.<sup>100</sup>

On a broader level, scholarly critics have noted that although the lack of amendments can be interpreted as a sign of stability and public acceptance of the constitution,<sup>101</sup> it also could be interpreted as a sign of "decay," with undue executive and majority legislative power rendering the process of interpretation vulnerable to entrenched political over independent judicial judgments.<sup>102</sup>

The arguments for and against reform therefore may be viewed as expressions of tension between a desire for political and social self-determination on the one hand, and acceptance of externally imposed universalist values (albeit adapted over time) on the other. At the same time, they also could be viewed as a struggle between the revival of familiar Japanese forms of political governance (historically pre-war albeit with significant changes) and a desire for a clean break with the past.

#### OBSTACLES TO REFORM

In light of these debates and the movement toward reform, it is instructive to examine the earliest formal reform effort that was undertaken shortly after the end of the Allied Occupation, when it first became politically possible to consider such a move. Many of the issues examined during that process continue to resonate today.<sup>103</sup>

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<sup>99</sup> PYLE, *AMERICAN CENTURY*, *supra* note 8, at 356–60.

<sup>100</sup> J. PATRICK BOYD & RICHARD SAMUELS, *NINE LIVES?: THE POLITICS OF CONSTITUTIONAL REFORM IN JAPAN* 62–63 (2005) [hereinafter, "BOYD & SAMUELS"]; Smith, *Constitutional Debate*, *supra* note 84 ("any attempt to revamp the status quo with regard to Article 9 will be viewed as opening the door to an expansionist Japan").

<sup>101</sup> Ward, *Constitution Commission*, *supra* note 6, at 402; Hamano, *Constitution and Human Rights*, *supra* note 38, at 417.

<sup>102</sup> Hamano, *Constitution and Human Rights*, *supra* note 38 at 417. *See also* Inoue, *Japan Constitution*, *supra* note 5, at 11 (arguing that the paucity of specific political governance provisions in the constitution, together with the stringent requirements for amendment, provide room for lawmakers to implement policies outside the constitution without any practical need for revision, but that such practices undermine the "power-limiting doctrines of constitutionalism").

<sup>103</sup> *See* Quigley, *Revising the Constitution*, *supra* note 18, at 143 (noting the resistance in the immediate post-war period of the Socialist Party, "which has tended to view

In 1956, the Diet passed a law establishing the Commission on the Constitution, which was charged with a broad investigation of the post-war constitution.<sup>104</sup> The law provided for a maximum of fifty members appointed directly by the Cabinet—thirty from the Diet and twenty from the ranks of “persons of learning and experience.”<sup>105</sup> It started work in 1957 and issued its final report in 1964.<sup>106</sup>

From the beginning, the commission’s work was the focal point of the struggle between the revisionist and anti-revisionist camps in Japan.<sup>107</sup> The socialists, who represented almost all the non-communist left at the time, boycotted the commission.<sup>108</sup> The remaining anti-revisionists (consisting of scholars and others “learned” in constitutional

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revisionism as a disguise for return of the old regime” echoing current anti-revisionist arguments). On January 20, 2000, the Lower House and Upper House formed research commissions to conduct a similarly broad and comprehensive study of the constitution. This constituted the second effort to reconsider the constitution. Similar to the first effort, no recommendations were made but they did attempt to provide a basis for future discussion. See *Constitutional Change in Japan – The Politics of Revision – The Mechanics of Revision*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/interactive/japan-constitution/politics-of-revision> (last visited Nov. 20, 2019). They issued their reports on April 15, 2005, and April 20, 2005, respectively. Final Report, Research Commission on the Constitution, The House of Representatives, (Apr. 2005), [http://www.shugiin.go.jp/internet/itdb\\_kenpou.nsf/html/kenpou/chosa/en/report.pdf/\\$File/report.pdf](http://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/chosa/en/report.pdf/$File/report.pdf); Handbook on the Research Report on the Constitution of Japan, Research Commission on the Constitution, House of Councillors, Japan (2005), <http://www.sangiin.go.jp/eng/report/ehb/ehb.pdf>.

<sup>104</sup> McNelly, *Constitutional Reform*, *supra* note 11, at 99.

<sup>105</sup> Ward, *Constitution Commission*, *supra* note 6, at 405.

<sup>106</sup> *Id.* at 404. The text of the final report at almost 900 pages, together with supplementary volumes, was voluminous, covering thousands of pages. Ward, *Constitution Commission*, *supra* note 6, at 404 n.5. A translation and edited version of the final report is available in English in JOHN A. MAKI, JAPAN’S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT (1980) [hereinafter, “MAKI, FINAL REPORT”].

<sup>107</sup> Ward, *Constitution Commission*, *supra* note 6, at 405–11.

<sup>108</sup> The socialists asserted that (i) it was unconstitutional for the Cabinet to set up under its own jurisdiction a commission charged with investigating a possible amendment, arguing that Article 96 of the constitution reserves this power to the Diet, and (ii) because the conservative majority had already decided to recommend constitutional revision, it did not want to lend legitimacy to the process. McNelly, *Constitutional Reform*, *supra* note 11, at 99; Ward, *Constitution Commission*, *supra* note 6, at 405. Similar sentiments color the current debates on constitutional revision. See McElwain, *supra* note 4, at 9 (“[c]urrently, opposition parties are refusing to even participate in Diet deliberations of constitutional amendment, over concerns that their participation will only legitimize the LDP’s proposals without any effect on their eventual content”). Ultimately, during the seven years of its existence, the commission maintained a total of 38 or 39 members, 19 of which were “persons of learning and experience”. Ward, *Constitution Commission*, *supra* note 6, at 405–06.

law, all of whom were substantially outnumbered) were able to extract concessions from the revisionist majority to avoid issuing recommendations by vote, which almost certainly would have resulted in amendment recommendations.<sup>109</sup> Instead, the commission maximized the factual and scholarly content of its report and, rather than presenting a majority view, compromised by presenting the individual viewpoints of all the committee members without conclusions or recommendations.<sup>110</sup>

Several results of the final report foreshadowed the current state of the amendment debate. Most, if not all, of the anti-revisionists believed in gradual change and adaptation of the document through judicial interpretation and administrative implementation, without formal amendment.<sup>111</sup> In contrast, the revisionist faction all agreed that while there may be room for interpretation and application, it is impossible to resolve the shortcomings of the document by those means alone, and that revision is necessary because their utilization has already gone beyond their limits.<sup>112</sup>

The commissioners considered a number of fundamental questions. Among them were whether the constitution must conform to the “universal principles of mankind” and to the “history, tradition, individuality and national character of Japan.”<sup>113</sup> They also considered whether the document must be “realistic and practical and in conformity with world trends.”<sup>114</sup>

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<sup>109</sup> Ward, *Constitution Commission*, *supra* note 6, at 406–07.

<sup>110</sup> *Id.* See also MAKI, FINAL REPORT, *supra* note 106, at 6–7 (quoting the Chairman of the Commission, Professor Kenzo Takayanagi: (i) that in light of the boycott of the Socialist Party, “it would have been nonsensical to adopt the usual majority rule and thereafter declare that the majority was in favor of constitutional revision”; (ii) that the Commission did not consider itself to be a policymaking body and therefore the quality of the opinions furnished to policymakers was more important than numerical strength; and (iii) suggesting that the Commission held hopes for future participation of the Socialist Party, which could be foreclosed by the issuance of a majority report).

<sup>111</sup> Ward, *Constitution Commission*, *supra* note 6, at 408; MAKI, FINAL REPORT, *supra* note 106, at 235–38. The anti-revisionist camp represented the liberal end of the political spectrum who were the strongest proponents for maintaining the original language of the constitution.

<sup>112</sup> MAKI, FINAL REPORT, *supra* note 106, at 232. The revisionist camp represented the conservative end of the political spectrum which characterized the instrument as “alien in authorship and idiom, destructive of the traditional status of the dynasty, disruptive of the family system and restrictive of military power.” Quigley, *Revising the Constitution*, *supra* note 18, at 144.

<sup>113</sup> MAKI, FINAL REPORT, *supra* note 106, at 213–16.

<sup>114</sup> *Id.* at 216–20.

Both revisionist and anti-revisionist factions agreed that the constitution should be one that is freely enacted by the Japanese people in conformity with such principles.<sup>115</sup> The difference of opinion regarding whether revisions would be required for the document to fulfill its objectives arose from different views regarding whether it was freely enacted by the Japanese people,<sup>116</sup> the extent to which its universalist principles infringed on the history and traditions of Japan,<sup>117</sup> and whether the three principles of pacifism, democracy, and human rights were too conceptual in light of world trends.<sup>118</sup>

Similarly, the commission unanimously agreed that the ideal of pacifism should be supported, and all the commissioners agreed on the right of individual and collective self-defense.<sup>119</sup> However, they were split on the issue of whether revision was required, with the revisionists in the majority.<sup>120</sup> The basic outlines of these divisions have continued largely along these lines to the present day.<sup>121</sup>

Then as now, domestic politics have been the principal reason for the failure of constitutional reform.<sup>122</sup> Opponents of revision have been continuously in the political minority during the post-war era, except for two brief periods in 1994-1995 (when the Socialists headed a coalition government with the LDP) and 2009-2012 (when the Democratic Party of Japan was able to achieve a majority of the House of Representatives (Lower House)). However, until recently the LDP has not been able to command the requisite two-thirds supermajority of both houses for amendment proposals to pass.<sup>123</sup> When they have, either

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<sup>115</sup> *Id.* at 218–19.

<sup>116</sup> *Id.* at 219. *See also supra* text at notes 11–36, 62.

<sup>117</sup> MAKI, FINAL REPORT, *supra* note 106, at 219. *See also supra* text at notes 37–49.

<sup>118</sup> MAKI, FINAL REPORT, *supra* note 106, at 219. *See also supra* text at note 41.

<sup>119</sup> MAKI, FINAL REPORT, *supra* note 106, at 271.

<sup>120</sup> *Id.* at 271–72.

<sup>121</sup> *See supra* text at notes 84–97.

<sup>122</sup> *See* BOYD & SAMUELS, *supra* note 100, at viii (citing a conservative-liberal coalition of pragmatists and pacifists up to the 1990s for the longevity of Article 9 without amendment). *See also* Kenneth Mori McElwain's and Daniel M. Smith's studies of how voters' sentiments on reform can be affected by the identity of the party proposing the change, as well as the specific content of the proposed change. McElwain, *supra* note 4, and *infra* note 123.

<sup>123</sup> From 2012, the LDP has led Japan's governing coalition with partner Komeito and has commanded a two-thirds majority in the Lower House since 2014. Memorandum by Daniel M. Smith, Prepared for the Columbia Law School Conference on Constitutional Reform in Japan on March 13, 2019 (Mar. 2, 2019) (on file with the author). This gave the LDP coalition sufficient power to override the House of Councillors (Upper House), but not the requisite bi-cameral supermajority to pass constitutional amendment proposals. Since 2016, the LDP, together with Komeito and

alone or as part of a coalition, they have failed internally or with their coalition partners to agree on the content and timing of changes.<sup>124</sup>

In addition to the legislative hurdles, revision requires a majority of all votes cast in a public referendum.<sup>125</sup> The constitution has continued to retain popular support, in particular the renunciation of war clause contained in Article 9.<sup>126</sup> Although sentiment has been shifting, the public mood for many years generally had not been receptive to change.<sup>127</sup> The post-war period up to the 1990s was largely a period of

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other parties favoring constitutional revision, has held a two-thirds majority of pro-revision members of the Upper House. McElwain, *supra* note 4, at 1. This supermajority in the Upper House was lost during elections held on July 20, 2019. Motoko Rich, *Shinzo Abe Declares Victory in Japan Election but Without Mandate to Revise Constitution*, N.Y. TIMES, July 21, 2019, at A4.

<sup>124</sup> Rieko Miko, *Abe taps Brakes on Constitution Reform as Support Flags*, NIKKEI ASIAN REV. (Oct. 6, 2018), <https://asia.nikkei.com/Politics/Abe-taps-brakes-on-constitution-reform-as-support-flags>; Martin, *Informal Amendment*, *supra* note 25, at 465 (lack of amendment “is due to a complex set of political dynamics both among the factions of the [LDP] . . . and among the LDP and the various opposition parties.”).

<sup>125</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96 (Japan); NIHONKOKU KENPŌ NO KAISEI TETUDUKI NI KANSURU HORITSU [Law Concerning Procedures for Amendment of the Constitution of Japan], Law No. 51, 2007 (“Amendment Procedures Law”), art. 98, clause 2 (Japan).

<sup>126</sup> Polling data in Japan on the question of constitutional change is notably mixed, with varying results depending on the framing, scope and content of the questions, which differ by poll-takers. In one 2017 poll, 89% of respondents replied that they believe the constitution has played a positive role in society since its implementation in 1947. See McElwain, *supra* note 4, at 4 (citing the annual surveys of Yomiuri Shimbun, Japan’s largest daily newspaper). Taking polling data from Kyodo News Service for the past three years as a baseline, responses to whether Article 9 should be revised have been split within a narrow band: 49% in favor, 47% opposed in 2017; 44% in favor, 46% opposed in 2018; and 45% in favor and 47% opposed in 2019. *The Constitution Turns 70*, JAPAN TIMES (May 3, 2017), <https://www.japantimes.co.jp/opinion/2017/05/03/editorials/constitution-turns-70/#.XZe4VG5FymQ>; *Majority of Japanese Oppose Any Constitutional Revisions Under Abe, But See Need for Future Changes, Poll Finds*, JAPAN TIMES (Apr. 26, 2018), <https://www.japanesetimes.co.jp/news/2018/04/26/national/majority-favor-constitutional-revision-just-not-abe-poll/#.XZe4cW5FymQ>; *Poll Shows 54% Oppose Revisions of Japan’s Pacifist Constitution Under Abe’s Watch*, JAPAN TIMES (Apr. 11, 2019), <https://www.japantimes.co.jp/news/2019/04/11/national/politics-diplomacy/poll-shows-54-oppose-revision-japans-pacifist-constitution/#.XZe4jm5FymQ>.

<sup>127</sup> The Law Library of Congress, Global Research Center, *Japan: Interpretations of Article 9 of the Constitution*, at 43 (Sept. 2015), <https://www.loc.gov/law/help/japan-constitution/interpretations-article9.php#-ftnref98> [hereinafter, “*Library of Congress Report*”] (citing polls indicating a clear majority of Japanese not favoring amendment, with no such proposals from the late 1950s to the 1980s, and citing separate polls indicating that since 1993, more people have favored amendment than opposed it). In the same Kyodo News Service polls cited above, responses to the more general

public complacency, with a relatively strong sense of security and absorption with domestic issues and economic development.<sup>128</sup> It was not until 2007 that the LDP was able to pass legislation to establish the procedures by which a public referendum could be held.<sup>129</sup>

Contributing to the perceived lack of pressing need for formal amendment, the Supreme Court has deferred to the executive and legislative branches on “political” questions.<sup>130</sup> As a result, a number of political initiatives implicating constitutional questions that otherwise may be subject to challenge or judicial review have been implemented without need for amendment through legislative action and executive branch interpretations. Relative political stability over many decades in the form of LDP rule, aided by the entrenching effect of electoral malapportionment, has facilitated the process of interpretative and legislative adaptation.<sup>131</sup>

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question of whether amending the constitution is “necessary” or “may be necessary” were distinctly clearer: 60% in favor, 37% opposed in 2017; 58% in favor, 39% opposed in 2018; and 63% in favor, 36% opposed in 2019. *See supra* note 126 and accompanying text. In a 2018 Yomiuri Shimbun survey, the percentages were 51% in favor, 46% opposed. McElwain, *supra* note 4, at 4.

<sup>128</sup> *Library of Congress Report*, *supra* note 127, at 23.

<sup>129</sup> During the intervening period a number of events caused Japan to begin the process of re-evaluating its international commitments and national security priorities, starting with the Gulf War in 1990 through the War on Terror after 9/11 and its aftermath. These events, coupled with strong U.S. pressure, required a re-examination of and renewed debate over the constitutional constraints on Japan’s military capabilities. The final trigger for the political shift which led to passage of the Amendment Procedures Law was the Koizumi Cabinet’s deployment of SDF forces overseas in the 2004. 2 OSAMU WATANABE ED., *KENPO KAISEI MONDAI SHIRYO* [MATERIALS ON THE CONSTITUTIONAL REVISION QUESTION] 429 (Tokyo: Junposha, 2015); Samuels, *Legislation Bureau*, *supra* note 93, at 24 (“the decision to put Japanese boots on Iraqi ground ... was epochal”).

<sup>130</sup> Scholars cite a number of institutional and political reasons for this. *See infra* notes 137–39.

<sup>131</sup> Notwithstanding its deference to the legislature, the Supreme Court has been willing to review voting power imbalances under the equal protection provisions of the Constitution. As redistricting legislation has not kept abreast of the large shift of the Japanese population from rural to urban areas, the Court has weighed in on the constitutionality of the apportionment rules under electoral laws, finding the apportionment schemes of two such laws unconstitutional. However, the Diet has failed to act on such findings and the Court has not enforced its holdings nor has it invalidated the results of any elections. *See supra* note 90 and accompanying text.



## ROLE OF INSTITUTIONAL ACTORS

The process of adaptation that has been characterized by this combination of judicial inaction and exercise of legislative power and bureaucratic authority are symptomatic of certain elements of pre-war practices that have carried over into the post-war political structure. These characteristics shed light on some of the institutional factors affecting the reform process.

The Supreme Court has been widely recognized, and criticized in some quarters, for its reluctance to exercise its power of judicial review over governmental actions.<sup>132</sup> As part of the dismantling of the pre-war political structure, the constitution elevated the judiciary to a co-equal branch of government and expressly granted the power of judicial review to the Supreme Court.<sup>133</sup> However, in its entire post-war history the Supreme Court has held only ten laws as unconstitutional on their face and approximately twelve as unconstitutional in their application.<sup>134</sup>

Lower courts, on the other hand, while still generally reluctant to challenge government action, have been willing to go further than the Supreme Court in exercising such powers in certain cases. For example, several have either directly held laws or government action to violate Article 9 or have expressed opinions, supported by extensive analysis, supporting such a view.<sup>135</sup> However, they have not stood as binding

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<sup>132</sup> See Law, *Judicial Review*, *supra* note 76, at 1426 (“...the...Supreme Court of Japan ...strikes down government actions so rarely that the judicial enforcement of constitutional limits on government power exists more in theory than in practice.”).

<sup>133</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81 (Japan) (“The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”).

<sup>134</sup> JONES & RAVITCH, *supra* note 35, at 165–67. In contrast, during the same time period as the existence of the Japanese Supreme Court, the German equivalent has struck down over 600 laws and the U.S. Supreme Court, with a docket similar in size, has struck down over 900 laws. Law, *Judicial Review*, *supra* note 76, at 1426. In an early decision disposing of a challenge to the creation of the Self Defense Forces as a violation of Article 9, the Supreme Court adopted a “cases and controversies” requirement for constitutional disputes. *Suzuki v. Japan*, 6 *Minshu* 9, 783 (Sup. Ct. Oct. 8, 1952). Thereafter, Japanese courts have not opined on constitutional issues in the absence of controversies ripe for judicial resolution. Unlike other civil law countries Japan does not have a constitutional court with authority to decide such questions in the abstract. See *infra* note 165.

<sup>135</sup> *Ito et al v. Minister of Agriculture, Forestry and Fisheries* [The Naganuma Nike Missile Site Case I], 712 *Hanrei Jiho* 24 (Sapporo D. Ct., Sept. 7, 1973); *Mori v. Japan*, Heisei 19 (ne) 58 (Nagoya High Ct., Apr. 17, 2008) [hereinafter, “Nagoya High Court Case”].

judgments as a result of the constitutional claims being disposed of on procedural or jurisdictional grounds, or being overturned on appeal.<sup>136</sup>

A number of views have been expressed about possible reasons for judicial deference to the government on constitutional questions.<sup>137</sup> Scholars have noted that the judiciary is a standalone bureaucracy populated by career jurists whose court assignments are determined by the personnel decisions of the Supreme Court Secretariat.<sup>138</sup> A successful career culminating in appointments to desirable assignments in the most prestigious courts, including the Supreme Court, is determined by performance as judged by the personnel department of the Secretariat, who are themselves ultimately accountable to the Director General of the Secretariat and the Chief Justice of the Supreme Court, who are political appointees.<sup>139</sup>

The void created by judicial inaction in interpreting the constitution has been filled by a small, elite unit under the jurisdiction of the Cabinet.<sup>140</sup> The Cabinet Legislation Bureau (the “CLB”) evaluates, screens and processes legislation proposed by the

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<sup>136</sup> Minister of Agriculture, Forestry and Fisheries v. Ito et al [The Naganuma Nike Missile Site Case II], 27 *Gyosai Reishu* 1175 (Sapporo High Ct., Aug. 5, 1976). See Hudson Hamilton, *Mori v. Japan: The Nagoya High Court Recognizes the Right to Live in Peace*, 19 PAC. RIM L. & POL'Y J. 549 (2010); *Library of Congress Report*, *supra* note 127, at 34–35. See *infra* note 181.

<sup>137</sup> They include conservative LDP dominance over Supreme Court and other judicial appointments, the constitutionally mandated, supreme lawmaking powers of the Diet, civil law principles limiting the judiciary to the application, not creation, of law, and the constitutional vetting role of the Cabinet Legislation Bureau (discussed *infra*, text at notes 138–148). Law, *Judicial Review*, *supra* note 76, at 1428–62; JONES & RAVITCH, *supra* note 35, at 167–72.

<sup>138</sup> J. Mark Ramseyer & Eric B. Rasmussen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, AM. POL. SCI. REV. 331, 334 (2001) [hereinafter, “Ramseyer & Rasmussen”]; KENNETH L. PORT ET AL., COMPARATIVE LAW: LAW AND THE PROCESS OF LAW IN JAPAN 257 (Durham: Carolina Academic Press, 3rd ed. 2015) [hereinafter, “PORT ET AL.”].

<sup>139</sup> JONES & RAVITCH, *supra* note 35, at 171; Law, *Judicial Review*, *supra* note 76, at 1448–51; Ramseyer & Rasmussen, *supra* note 138, at 334 n.6. But see JOHN O. HALEY, THE JAPANESE JUDICIARY: MAINTAINING INTEGRITY, AUTONOMY, AND THE PUBLIC TRUST, in DANIEL H. FOOTE, LAW IN JAPAN: A TURNING POINT 99, 114 (University of Washington Press, 2007) (“... judges in Japan ... enjoy a greater degree of independence from political intrusion than in any other industrial democracy, both with respect to individual cases as well as the composition of the judiciary ....”).

<sup>140</sup> Martin, *Informal Amendment*, *supra* note 25, at 469–70; JONES & RAVITCH, *supra* note 35, at 59; Samuels, *Legislation Bureau*, *supra* note 93 (“Because of this ... jurisprudential void, ... the CLB has emerged as a quasi-constitutional court with a *de facto* monopoly on interpreting the constitution.”).

government through its various Ministries.<sup>141</sup> Initially disbanded during the Allied Occupation which regarded it as embodying an undesirable concentration of political power,<sup>142</sup> it was re-established immediately after the Allied Occupation ended.<sup>143</sup> It is staffed by highly regarded career bureaucrats from various top ministries as well as prosecutors and judges. It has earned a reputation over the decades as a rigorous, high quality gatekeeper of government-sponsored legislation.<sup>144</sup> In the period between 1947 and 2005, only one law it has examined has been ruled unconstitutional,<sup>145</sup> and among the ten cases in which the Supreme Court found a law unconstitutional, most have been Diet-, not Cabinet-originated.<sup>146</sup>

The significance of the CLB's role is underscored by its function in advising the Cabinet on constitutional issues and, by extension, the Diet on behalf of the government. It has played a central role in various interpretations of legislation or executive authority adopted by the government during the post-war years.<sup>147</sup> The Director General of the CLB is one of the five top bureaucrats permitted to assist the Prime Minister and other Ministers during Diet sessions when they are questioned about the interpretation of the constitution or other laws.<sup>148</sup> The limited role played by the Supreme Court in adjudicating constitutional questions makes the interpretations expressed by the government, whether through the CLB, the Prime Minister or other Ministers with the assistance of the CLB, carry significant weight.<sup>149</sup>

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<sup>141</sup> *Naisei Kyoku Setchi Ho* [Cabinet Legislation Bureau Establishment Law] 1952; Samuels, *Legislation Bureau*, *supra* note 93, at 5; JONES & RAVITCH, *supra* note 35, at 58. The significance of this role is underscored by the fact that only about 10% of laws passed by the Diet actually originate within the Diet (as opposed to Cabinet-sponsored legislation). JONES & RAVITCH, *supra* note 35, at 128. The average passage rate for legislation submitted by the Cabinet has consistently exceeded 80% during the post-war period. *Id.* at 140.

<sup>142</sup> JONES & RAVITCH, *supra* note 35, at 58. During the period from 1945 to 1952 it had been moved under the Ministry of Justice. Yamamoto, *Constitutional Interpretation*, *supra* note 54, at 109.

<sup>143</sup> Samuels, *Legislation Bureau*, *supra* note 93, at 4.

<sup>144</sup> *Id.* at 4–5; JONES & RAVITCH, *supra* note 35, at 57–58.

<sup>145</sup> Samuels, *Legislation Bureau*, *supra* note 93, at 7; *Library of Congress Report*, *supra* note 127, at 17.

<sup>146</sup> JONES & RAVITCH, *supra* note 35, at 171.

<sup>147</sup> Goodman, *Contemplated Amendments*, *supra* note 89, at 66; Samuels, *Legislation Bureau*, *supra* note 93, at 5.

<sup>148</sup> JONES & RAVITCH, *supra* note 35, at 59.

<sup>149</sup> JONES & RAVITCH, *supra* note 35, at 59; Goodman, *Contemplated Amendments*, *supra* note 89, at 66 (“... the opinions of the CLB are given great weight by all branches of the government – legislative, executive and judicial. It has been suggested

And where the judiciary has not expressed a view or declined to express a view on constitutional questions, its interpretation is effectively final.<sup>150</sup>

During the pre-war years the judiciary was under the jurisdiction of the Ministry of Justice, and accordingly was subordinated to the executive and legislative branches.<sup>151</sup> The predecessor of the CLB, the Legislation Bureau, in addition to having broad powers of review over acts of every Ministry as well as the Emperor's Privy Council, also housed the highest administrative court.<sup>152</sup> This effectively positioned it as the sponsor, arbiter and reviewer of all pre-war legislation, facilitating control over the legislative process.<sup>153</sup> Although the drafters of the post-war constitution sought to reorient this political structure,<sup>154</sup> there is a reasonable basis to question whether judicial deference and continuing LDP political dominance over the legislative and executive branches echo at least some elements of the pre-war political structures and practices.<sup>155</sup>

#### TENSIONS CREATED BY INCREMENTAL ADAPTATION

Although a number of provisions in the Japanese constitution have been subject to a process of incremental adaptation, and others

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that opinions of the CLB are so significant that the Supreme Court of Japan follows them rather than its own view.”).

<sup>150</sup> JONES & RAVITCH, *supra* note 35, at 57.

<sup>151</sup> Law, *Judicial Review*, *supra* note 76, at 1435. Under the Meiji Constitution, the Supreme Court of Judicature (the predecessor of the Supreme Court) did not have power of judicial review over legislation or regulations. JONES & RAVITCH, *supra* note 35, at 165.

<sup>152</sup> Samuels, *Legislation Bureau*, *supra* note 93, at 3–4.

<sup>153</sup> During this period the Director General of the Legislation Bureau was often a sitting member of the Diet. Samuels, *Legislation Bureau*, *supra* note 93, at 8.

<sup>154</sup> Law, *Judicial Review*, *supra* note 76, at 1435; PORT ET AL., *supra* note 138, at 257. The evolution of the CLB into an independent and neutral arbiter of legislative and constitutional questions first emerged during the Allied Occupation as a reaction against efforts to strengthen the power of the Prime Minister over the civil bureaucracy. These efforts were resisted by CLB bureaucrats and since then, the relationship between the CLB and the Prime Minister has been marked by efforts by the CLB to maintain bureaucratic independence in the face of efforts by Prime Ministers to control and supervise the Ministries and Agencies. Samuels, *Legislation Bureau*, *supra* note 93, at 9.

<sup>155</sup> The Democratic Party of Japan after its election victory in 2009, in reacting to long-standing criticism of the CLB's role in assisting the Prime Minister or other Ministers in responding to Diet questions about the constitution or other laws as undemocratic executive control over the legislative process, declined to engage the services of the CLB during its tenure. JONES & RAVITCH, *supra* note 35, at 59.

have been proposed to fill perceived gaps, the discussions, debates and controversies surrounding the disarmament provisions of Article 9 have been the most visible to outside observers.

The longstanding and extensive debates surrounding Article 9 are prominent examples of the complex interaction of multiple aspects of the constitutional reform debate, and the struggle to reconcile interpretative conflicts arising from incremental adaptation.<sup>156</sup> Japanese responses to the constraints imposed by the provision illustrate the tendency of the judiciary to defer to bureaucratic actions and the ability of a long-entrenched political class to assert policy through constitutional interpretation rather than formal amendment.<sup>157</sup> The dilemmas giving rise to the debates illustrate the unintended consequences arising from attempts to shape a conservative society to a liberal order based on democratic ideals and the struggle to adapt constitutional pacifism to changing international circumstances.

The origins of Article 9 illustrate how quickly the text of the post-war constitution created challenges after enactment.<sup>158</sup> Instructions to the original GHQ drafters contemplated a complete renunciation of war and exclusive reliance on the goodwill of the

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<sup>156</sup> See Samuels, *Legislation Bureau*, *supra* note 93, at 7 (“...no portion of the Constitution has been more hotly contested than Article IX and no issue has been more “political” than the constitutionality of the Self-Defense Forces”).

<sup>157</sup> In contrast, the Supreme Court has been more willing to exercise judicial interpretation to define permissible exercise of rights under the document in social and cultural contexts. These cases include those involving constitutional rights to religious freedom and freedom of expression. See, e.g., *Kakunaga v. Sekiguchi*, 31 *Minshu* 533 (Sup. Ct. July 13, 1977) (religious freedom); *Japan v. Nakaya*, 42 *Minshu* 277 (Sup. Ct. June 1, 1988) (religious freedom); *Kimigayo Case*, 61 *Minshu* 291 (Sup. Ct. Feb. 27, 2007) (freedom of expression); *Japan v. Osawa* 28 *Keishu* 9 (Sup. Ct. Nov. 6, 1974) (freedom of expression).

<sup>158</sup> See *supra* notes 57–58 and accompanying text (description of the issues that the pacifist and democratic ideals of the document created for the U.S. during the Cold War). The text of Article 9 reads:

Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

international community for Japan's defense,<sup>159</sup> thereby seemingly precluding the maintenance of arms or use of force even for self-defense.<sup>160</sup>

During the course of the negotiations, it evolved into a version which was to permit room for interpretation of the question of individual self-defense.<sup>161</sup> SCAP was willing to concede that notwithstanding the apparent ban on the maintenance of land, sea and air forces as well as "other war potential," Japan would be permitted to maintain such forces for defensive purposes.<sup>162</sup> However, in struggling to explain how the right of self-defense could be consistent with the prohibition against arms, Prime Minister Shigeru Yoshida stated during the pre-promulgation 1946 Diet debate that, although there was nothing that directly denied the right of individual self-defense, the prohibition on maintaining "war potential" had such effect.<sup>163</sup>

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<sup>159</sup> 1 TAKAYANAGI ET AL., *supra* note 16, at xxxii-xxxiii.

<sup>160</sup> The so-called "MacArthur Note", which was the basis upon which the first U.S. draft of the constitution was produced, provided for Japan to renounce war "even for preserving its own security". This went further than the official policy statement of the State-War-Navy Coordinating Committee, SWNCC-228 (Jan. 7, 1946), which contemplated the establishment of a new military under civilian control. *Library of Congress Report*, *supra* note 127, at 6-7. The phrase was excluded from the first draft that was presented by GHQ to the Japanese government. *Id.* at 7-8. MacArthur would later say that nothing in Article 9 was intended to prevent Japan from taking measures to preserve its own security. REMINISCENCES, *supra* note 8, at 304; 1 TAKAYANAGI ET AL., *supra* note 16, at xxxiii; Quigley, *Revising the Constitution*, *supra* note 18, at 141.

<sup>161</sup> See 2 TAKAYANAGI ET AL., *supra* note 16, at 143-45 (tracing the evolution of the language of the provision); *Library of Congress Report*, *supra* note 127, at 8-9 (describing the amendments proposed by the Constitutional Amendment Committee of the Diet, chaired by Hitoshi Ashida, permitting this reinterpretation (the "Ashida amendments")).

<sup>162</sup> McNelly, *Constitutional Reform*, *supra* note 11, at 93 ("Whitney concurred in this interpretation [that the textual modifications would permit Japan to maintain defense forces] and agreed that this ... was 'acceptable'"). The increasing social, political and security concerns that emerged during the immediate years after adoption revealed the tensions between the document's aspirations and geopolitical realities. With the onset of the Korean War and escalating concerns about the growing communist threat, complete demilitarization of Japan was quickly ruled out of the question by the U.S. *Library of Congress Report*, *supra* note 127, at 10-12.

<sup>163</sup> See YOSHIYUKI NODA, INTRODUCTION TO JAPANESE LAW 193-94 (University of Tokyo Press, 1976) (quoting Prime Minister Yoshida: "The article ... does not directly deny the right to legitimate defense, but since its second paragraph suppresses all rearmament ... the result is that the Constitution has renounced all sorts of war, even those undertaken as ... legitimate defense...."). McNelly, *Constitutional Reform*, *supra* note 11, at 95 ("Notwithstanding the Ashida amendments ... Prime Minister Yoshida and his government maintained their interpretation that Article 9 forbade even defensive war and arms.").

The Supreme Court first weighed in on the war potential question in a 1952 case that challenged the constitutionality of the National Police Reserve,<sup>164</sup> the predecessor to the SDF. In declining to address the issue, the Court dismissed the case based on lack of standing.<sup>165</sup> This would be one of only two cases in which the Supreme Court would express a view on Article 9,<sup>166</sup> and would establish a pattern for judicial responses to Article 9 adjudication. Contemporaneously, the CLB construed the National Police Reserve's military capabilities as being insufficient to constitute "war potential" within the meaning of Article 9, beginning a separate line of bureaucratic interpretation.<sup>167</sup>

The tension between the prohibitions of the disarmament clause and political necessity was highlighted by the debates preceding enactment of the San Francisco Peace Treaty and the US-Japan Security Treaty in 1952.<sup>168</sup> Each treaty explicitly recognized Japan's right to individual and collective self-defense and expressed the expectation that

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<sup>164</sup> The National Police Reserve, established in 1950, was reorganized as the National Safety Force in 1952. *Library of Congress Report*, *supra* note 127, at 14; Yamamoto, *Constitutional Interpretation*, *supra* note 54, at 105.

<sup>165</sup> *Suzuki v. Japan*, 6 *Minshu* 9, 783 (Sup. Ct. Oct. 8, 1952). See PORT ET AL., *supra* note 138, at 249 (citing Herbert F. Bolz, *Judicial Review in Japan: The Strategy of Restraint*, 4 *HASTINGS INT'L & COMP. L. REV.* 87 (1980)) (stating the Court noted Article 81 of the Constitution only refers to a "court of last resort", reasoning that co-equality among the three branches of government limited its power to considering only constitutional questions raised in concrete legal disputes and not in the abstract). This case, together with the lack of the traditional powers of a constitutional court, has formed the basis for the Supreme Court's refusal to exercise its power of judicial review in the absence of a case or controversy.

<sup>166</sup> See *infra* notes 175–76.

<sup>167</sup> Samuels, *Legislation Bureau*, *supra* note 93, at 11.

<sup>168</sup> The San Francisco Peace Treaty formally ended hostilities between Japan and its other signatories (which did not include the Soviet Union and China). Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169; T.I.A.S. No. 2490; 136 U.N.T.S. 45 [hereinafter, "San Francisco Peace Treaty"], <http://www.taiwandocuments.org/sanfrancisco01.htm>. The US-Japan Security Treaty was entered into the same day. Bilateral Security Treaty Between the United States of America and Japan, September 8, 1951 [hereinafter, "US-Japan Security Treaty"]. It granted to the U.S. rights to maintain bases in Japan and to use them not only for the defense of Japan, but also for the maintenance of regional and domestic security. US-Japan Security Treaty, art. 1. The latter rights were subsequently revised as part of the 1960 renewal of the Treaty. Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Jan. 19, 1960, 11 U.S.T. 1632; T.I.A.S. No. 4500, art. VI, <https://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html>.

Japan would assume responsibility for its own defense.<sup>169</sup> This highlighted the continuing need to resolve the inherent conflict between these commitments and the 1946 interpretation of Article 9 regarding individual self-defense. It also formally introduced an additional level of complexity with its express recognition of Japan's right of collective self-defense. This was significant in the context of the new U.S.-Japan alliance, because it raised questions about the ability of Japan to come to the aid of the U.S. in the event of military conflict.<sup>170</sup>

The first notable bureaucratic reinterpretation of Article 9 therefore occurred during the 1954 debates on the Self Defense Forces Law,<sup>171</sup> pursuant to which the SDF was formally established, and the US-Japan Mutual Defense Assistance Agreement (the "MSA Agreement")<sup>172</sup> entered into force during the same year. The Japanese government, through a CLB interpretation, resolved the interpretative question about self-defense by taking the position that although the right of individual self-defense is recognized as the right of all sovereign nations, the use of force in exercising such right must be limited under Article 9 to the extent "minimally necessary."<sup>173</sup> On the question of collective self-defense, it reaffirmed the principle that although Japan has a "right" to collective self-defense, it is prohibited from "exercising" such right.<sup>174</sup> Thus, the apparent conflicts between constitutionally mandated disarmament and Japan's treaty obligations were addressed by administrative interpretations that were to become the position of the Japanese government for almost 60 years.

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<sup>169</sup> San Francisco Peace Treaty, *supra* note 168, Article 5(c); US-Japan Security Treaty, *supra* note 168, preamble. *Library of Congress Report*, *supra* note 127, at 13–14.

<sup>170</sup> See *Library of Congress Report*, *supra* note 127, at 21–23 (describing the debates in the Diet at the time the Peace Treaty and US-Japan Security Treaty were being considered, during which the government for the first time formally took the position that while Japan had a collective defense right, it "had decided against war potential under Article 9" – i.e., declines to exercise such right).

<sup>171</sup> Jieitaiho [Self Defense Forces Law], Law No. 165 of 1954 (Japan).

<sup>172</sup> Mutual Defense Assistance Agreement Between the United States of America and Japan, March 8, 1954, 5 U.S.T. 661; Nihonkoku to Amerika Gasshukoku to no Aida no Sogo Boei Enjo Kyotei, Treaty No. 6 of 1954, <http://people.unica.it/annamariabaldussi/files/2015/04/USA-Japan-Treaty-1954.pdf>.

<sup>173</sup> *Library of Congress Report*, *supra* note 127, at 16.

<sup>174</sup> *Library of Congress Report*, *supra* note 127, at 15, 22. At the same time the SDF law was passed, the Upper House also passed the Resolution on the Ban on Dispatching the SDF Abroad in order to address concerns that the MSA Agreement would lead Japan to dispatch the SDF not to defend Japan, but for the collective defense of an ally. *Id.* at 15.



Notwithstanding these clarifications, social and political disputes generated by opposing views of Japan's treaty obligations with the U.S. and its constitutional constraints gave the Supreme Court its second opportunity to formally address Article 9.<sup>175</sup> Although it reaffirmed in non-binding dicta that Japan has an inherent right to self-defense, in its only statement to date addressing the constitutionality of the provision, it chose to interpret the grant of rights to maintain U.S. war potential on Japanese soil under the Treaty as a "political" question beyond the scope of judicial review in the absence of a "clear" and unmistakable violation of Article 9.<sup>176</sup>

Since then, there have been at least four notable expansions of governmental interpretations of Article 9, in each case related to legislation passed in response to geopolitical events recognizing that such responses were required to address the changing requirements of the U.S.-Japan alliance and Japan's own security interests.<sup>177</sup> All of these interpretative expansions have taken place since the mid-1990s and have been initiated by the Japanese government.<sup>178</sup> These events

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<sup>175</sup> At the time of its decision, these disputes between the left and right were building up to explosive conflict during the US-Japan Security Treaty renewal debates of 1960. The right, chafing under the continuing presence of U.S. bases, recognized their presence was necessary for the continued freedom to focus on the economic recovery of the country. The left vehemently objected to Japan's continuing partnership with the U.S. and the fear of entanglement in overseas conflicts. The conflict led to the resignation of Prime Minister Nobusuke Kishi, but not before he forced through the renewal. PYLE, *AMERICAN CENTURY*, *supra* note 8, at 200–06.

<sup>176</sup> *Sakata v. Japan*, 13 *Keishu* 3225 (Sup. Ct. Dec. 16, 1959) [Showa 34 (A) 710].

<sup>177</sup> The first of these came after the Gulf War when the Peace Keeping Operation Law ("PKO Law") was passed in 1992 (which permitted the dispatch of SDF personnel abroad for humanitarian purposes but prohibited the use of force). The Second came in 1999 and arose in the wake of North Korean missile launches in 1993 and its nuclear build-up in 1994-1996 (extending Japanese military activity to "rear area" support of U.S. forces – i.e., the public sea and air above Japan -- but avoided the issue of "use of force" under the principle of non-integration with the military force of a foreign country). The third reinterpretation came in connection with a series of laws arising from the 9/11 attacks and the subsequent War on Terror in 2003 and 2004 (permitting dispatch of SDF troops to countries engaged in ongoing hostilities, but prohibiting deployment in specific hostile areas of such countries, and expanding the definition of "rear area" to remove geographic restrictions while continuing limitations on the use of force). The fourth change in interpretation came in 2013 (maintaining the policy that Article 9 permits "use of force" to the minimum extent necessary for self-defense but expanding "use of force" situations to circumstances when an ally is attacked; i.e., permitting collective self-defense in such situations, but subject to strict conditions). See generally, *Library of Congress Report*, *supra* note 127, at 23–41. For the significance of the fourth reinterpretation, see *infra* text at notes 182–192.

<sup>178</sup> *Library of Congress Report*, *supra* note 127.

compelled the government to expand the role of the SDF, including deployment overseas, which fueled ongoing and intensifying constitutional debates.<sup>179</sup>

The courts have continued to hear challenges to the constitutionality of these governmental actions and various others related to Article 9.<sup>180</sup> However, the standard of deference established by the Supreme Court has continued to be reaffirmed.<sup>181</sup> The result has been a gradual expansion of the substantive and geographic scope of permitted Japanese defense activity.

During the course of these developments the CLB played a central role in providing the legal justification for the continued expansion of the interpretation of individual self-defense.<sup>182</sup> However, it continued to draw the line on the prohibition against the exercise of the right to collective self-defense.<sup>183</sup>

Amidst escalating tensions in Asia marked by successful nuclear tests in North Korea and territorial claims by China in the South China Sea, questions about the sustainability of the interpretative process,

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<sup>179</sup> *Id.*

<sup>180</sup> John O. Haley, *supra* note 76, at 1472 (Since 1947, Japanese courts have adjudicated at least two dozen cases related to the constitutionality of various measures under Article 9).

<sup>181</sup> As noted previously, lower court cases holding such acts unconstitutional have either decided such cases on different grounds or have had their holdings reversed by higher courts. *See supra* notes 135–36 and accompanying text. The most significant of these was the Nagoya High Court Case, which in 2005 consolidated five of seven preliminary injunction actions against the dispatch of SDF troops to Iraq under the Iraq Special Measures Law. The court stated in dicta that the Air SDF was operating in a combat area (the Baghdad Airport) and that the prohibition on use of force in effect at the time were violated by an impermissible integration of the Air SDF airlifts with the use of force of a foreign country. The government won the case on procedural grounds and the plaintiffs, although they lost, were satisfied with the moral victory and therefore chose not appeal. *Library of Congress Report, supra* note 127, at 34–35. The government has stated that it does not feel bound by the constitutional findings of the ruling. *Id.* at 35; Law, *Judicial Review, supra* note 76, at 1427 n.8.

<sup>182</sup> *See* Samuels, *Legislation Bureau, supra* note 93, at 9, 11 (arguing the CLB has jealously protected its bureaucratic turf as the guardian of constitutional interpretation against political pressure on a range of issues, including use of force: “there have been changes in national security policy and civil-military relations since 1945, and the CLB has always been right in the thick of things”).

<sup>183</sup> Samuels argues that by the time of the anti-terror legislation in 2003–2004, although official reinterpretation of the question was not to be stated until 2014, “[c]ollective defense effectively was a new ‘fact on the ground’...” given the scope of Japanese military activity abroad. *Id.* at 22.

which had been building for years,<sup>184</sup> finally peaked in 2014. After witnessing years of interpretations blocking the government's ability to respond with force to attacks on allies,<sup>185</sup> Prime Minister Shinzo Abe initiated a series of actions beginning with the replacement of the Director General of the CLB.<sup>186</sup> This was followed in rapid succession by the resignation of the new Director General and the submission of a report from a separate governmental advisory panel charged with recommendations on how Article 9 should be reinterpreted,<sup>187</sup> effectively removing the question from the CLB. A Cabinet resolution was then passed in July 2014, based upon which it issued a new interpretation of "use of force" under Article 9 to expressly permit collective self-defense.<sup>188</sup>

The new policy was promptly implemented in a 2015 enactment of a comprehensive package of national security legislation which included the establishment of Japan's first National Security Council as

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<sup>184</sup> See *id.* at 15–25 (describing increasing criticisms by politicians of the CLB and its interpretative positions on the limitations of the right to collective self-defense up to at least the period of Prime Minister Junichiro Koizumi's tenure).

<sup>185</sup> *Id.* at 14–15.

<sup>186</sup> Goodman, *Contemplated Amendments*, *supra* note 89, at 67; Martin, *Informal Amendment*, *supra* note 25, at 477; Yamamoto, *Constitutional Interpretation*, *supra* note 54, at 113.

<sup>187</sup> Martin, *Informal Amendment*, *supra* note 25, at 475–78. The Advisory Panel on the Reconstruction of the Legal Basis for Security was established by Prime Minister Abe during his first term in 2007 to provide recommendations on how Article 9 should be reinterpreted. Its work was suspended upon his resignation but was revived upon his return to power in 2012, with a renewed and broadened mandate to update its prior report. *Id.* at 475–76.

<sup>188</sup> Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People [Provisional Translation] (July 1, 2014), [https://www.mofa.go.jp/fp/nsp/page23e\\_000273.html](https://www.mofa.go.jp/fp/nsp/page23e_000273.html). See also *Library of Congress Report*, *supra* note 127, at 37–39 ("The government did not state that acts based on 'collective self-defense' are permitted under Article 9. Rather, the government expanded the standards of 'use of force' so that Japan can use force, if other conditions are met, when an ally of Japan is attacked.") The reasons for the new interpretation were stated to be "that the strategic environment around Japan had become more threatening, and that the government's obligation to guarantee the security of the Japanese people required a more robust national security posture, and particularly the development of a more proactive role within the US-Japan security arrangements." Martin, *Informal Amendment*, *supra* note 25, at 478.

well as a state secrets law.<sup>189</sup> Accompanied by a storm of criticism,<sup>190</sup> this legislation was the latest, perhaps most controversial interpretative stretch. Moreover, the circumstances and manner in which it was implemented have raised serious concerns about the limits and legitimacy of incremental adaptation.<sup>191</sup> This in turn has raised questions about the legitimacy of interpretative change, the appropriate limits of “informal constitutional amendments” and the desirability of a more formal process for change.<sup>192</sup>

## CONCLUSION

With passage of the Amendment Procedures Law in 2007<sup>193</sup> and its subsequent revisions in 2014,<sup>194</sup> the basic legal framework has been established for conducting a public referendum on constitutional amendment proposals. Upper and Lower House committees have been established to debate and recommend proposals to the Diet.<sup>195</sup> The LDP, its coalition partners and opposition parties continue to navigate the strategic and tactical complexities of the political process.<sup>196</sup>

Japan’s responses to the constraints of Article 9 are one example of how institutional actors have adapted over time the seemingly

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<sup>189</sup> Adam Liff & Andrew Erickson, *From Management Crisis to Crisis Management? Japan’s Post-2012 Institutional Reforms and Sino-Japanese Crisis (In)stability*, 40 J. STRATEGIC STUD. 604, 624–28 (2017); Christopher Hughes, *Japan’s Strategic Trajectory and Collective Self-Defense: Essential Continuity or Radical Shift?*, 43 J. JAPANESE STUD. 93, 93–94 (2017).

<sup>190</sup> See SHEILA A. SMITH, JAPAN REARMED 155 (Harvard Univ. Press 2019) (“Diet deliberations over the legislation to implement this constitutional reinterpretation ... drew protests on a scale unprecedented since the 1960 demonstrations against the revision of the US-Japan Security Treaty”); *Experts’ Tongue-Lashing Rekindles Diet Debate on Reinterpreted Constitution*, THE JAPAN TIMES, June 5, 2015.

<sup>191</sup> SMITH, *supra* note 190, at 163–64 (“it was clear that for many Japanese, the Abe cabinet’s reinterpretation came dangerously close to overturning Article 9.”).

<sup>192</sup> See *supra* notes 79–80 and accompanying text.

<sup>193</sup> See *supra* note 125 and accompanying text.

<sup>194</sup> NIHONKOKU KENPO NO KAISEI TETUDUKI NI KANSURU HORITSU NO ICHIBU WO KAISEI SURU HORITSU [LAW PARTIALLY AMENDING THE LAW CONCERNING PROCEDURES FOR AMENDMENT OF THE CONSTITUTION OF JAPAN], Law No. 75, (2014).

<sup>195</sup> 100 votes in the Lower House and 50 votes in the Upper House are required to submit proposals for amendment in both Houses, but an absolute two-thirds majority is required to adopt amendment proposals. The Diet Law, ch. V-II, art. 68-II.

<sup>196</sup> For a comprehensive overview of the current political process, see CFR Infoguide, *Constitutional Change in Japan – The Politics of Revision – Evolving Proposals for Revision* (2019), <https://www.cfr.org/interactive/japan-constitution/politics-of-revision>; see also *Constitutional Reform Talks in Japan Slide to 2019*, THE JAPAN TIMES, Dec. 6, 2019.

conflicting text of Japan's constitution to post-war realities. In the case of Article 9, judicial deference combined with bureaucratic interpretation have expanded the scope of the provision's textual limitations. This has occurred against the larger backdrop of adapting an essentially foreign document to domestic political and social practices, a process which has taken place in different contexts in accordance with judicial interpretations and legislative acts.<sup>197</sup>

This combination of responses has permitted the Japanese constitution to adapt to shifting domestic and international changes with remarkable stability. Notwithstanding this process of adaptation (or perhaps in reaction to it), the Japanese public appears to have started to recognize the limitations of the document, and the need for more formal change.<sup>198</sup>

After decades of relative domestic and international stability between the 1960s and 1990s, a number of events have provided the LDP with a more credible basis to appeal for such change to larger segments of political leadership and the electorate. The rise of the North Korean nuclear threat in the mid-1990s followed by the Gulf War and the Global War on Terror, crises in the Taiwan straits, the emergence of China as an economic and strategic rival, the Kobe earthquake and Fukushima disasters, Imperial abdication, changing demands for social equality, and continuing voter disparity issues, have all increased the public dialogue about the desirability and possibility for constitutional reform.

Finally, some continue to assert aspirations of self-determination. It is a tribute to the democratic principles that have been established in Japan that full debates are taking their course in an open legislative and, possibly, public referendum process to resolve issues of timing and the scope of desired change. If reform does eventually occur, one could question whether it represents the beginning of a more fundamental alignment of the country with its historical roots and the first formal recognition of the limits of Western-imposed universalism, or the first small steps towards truly accepting the document as a natural instrument of national governance.

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<sup>197</sup> See *supra* notes 69–75, 157 and accompanying text.

<sup>198</sup> See *supra* notes 126–27 and accompanying text.